85-315

Supreme Court, U.S.
F I L E
AUG 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

THOMAS J. ITALIANO, PETITIONER

VS.

STATE OF OHIO, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OHIO

PETITION

Paul W. Cassidy
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6400 Pearl Road
Parma Heights, Ohio 44130
(216) 884-8000

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QUESTIONS PRESENTED

I. Whether Petitioner was denied due process of law in violation of the 14th Amendment of the Constitution when the Supreme Court of Ohio found that a prosecutor's duties regarding plea bargaining could be delegated to police officers.

II. Whether Petitioner was denied due process of law in violation of the 14th Amendment of the Constitution when he was convicted of attempted bribery for trying to influence police officers in their duties when such duties had never been previously explicated.

III. Whether Petitioner was denied due process of law in violation of the 14th Amendment of the Constitution when he was convicted for bribing police officers in regards to a duty arising from custom or usage, even though there was no evidence of such custom or usage given at the trial.

IV. Whether Petitioner was denied due process of law in violation of the 14th Amendment to the Constitution when the Supreme Court of Ohio held that he was guilty of trying to bribe a prosecutor by giving money to police officers when the indictment, the State's case, and all briefs on behalf of the State alleged bribery of police officers alone.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

Thomas J. Italiano, Petitioner
vs.
State of Ohio, Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court
of the State of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Thomas J. Italiano, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above-entitled case on June 26, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio is reported at 18 Ohio State 3d 38, and is printed in Appendix A

hereto, infra, page 15. The judgment of the Eighth Appellate District Court of Appeals of Ohio is printed in Appendix A hereto, infra, page 35. The Journal Entry of Judgment of the Common Pleas Court of Cuyahoga County, Ohio is printed in Appendix A hereto, infra, page 48.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257(3), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where

any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED

I. Whether Petitioner was denied due process of law in violation of the 14th Amendment of the Constitution when the Supreme Court of Ohio found that a prosecutor's duties regarding plea bargaining could be delegated to police officers.

II. Whether Petitioner was denied due process of law in violation of the 14th Amendment of the Constitution when he was convicted of attempted bribery for trying to influence police officers in their duties when such duties had never been previously explicated.

III. Whether Petitioner was denied due process of law in violation of the 14th

Amendment of the Constitution when he was convicted of bribing police officers in regard to a duty arising from custom or usage, even though there was no evidence of such custom or usage given at the trial.

IV. Whether Petitioner was denied due process of law in violation of the 14th Amendment to the Constitution when the Supreme Court of Ohio held that he was guilty of trying to bribe a prosecutor by giving money to police officers when the indictment, the State's case, and all briefs on behalf of the State alleged bribery of police officers alone.

CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

Section One Of The Fourteenth Amendment To The Constitution Of The United States

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 2921.02 BRIBERY

(A) No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

(B) No person, either before or after he is elected, appointed, qualified, employed, summoned, or sworn as a public servant or party official, shall knowingly solicit or accept any valuable thing or valuable benefit to corrupt or influence him with respect to the discharge of his duty.

(C) No person, with purpose to corrupt a witness or to influence him with respect to his testimony in an official proceeding, either before or after he is subpoenaed or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

(D) No person, either before or after he is subpoenaed or sworn as a witness, shall knowingly solicit or accept any valuable thing or valuable benefit to corrupt or influence him with respect to his testimony in an official proceeding.

(E) Whoever violates this section is guilty of bribery, a felony of the third degree.

(F) A public servant or party official who is convicted or bribery is forever disqualified from holding any public office, employment or position of trust in this state.

STATEMENT OF CASE

Petitioner, an attorney, was convicted of two counts of attempted bribery arising out of his plea bargaining on behalf of a client charged with driving under the influence of alcohol. The police officers who cited Petitioner's client were present at the pretrial of the case. Petitioner gave money to each of the police officers.

The police officers testified that the Petitioner did not ask them to change their testimony or not to appear at

future hearings in exchange for the money.

These police officers, who are not attorneys, were found to have had the authority to grant or deny modifications in the charge, to plea bargain. This authority in the police officers does not exist in any regulation, ordinance, or statute. Nor was any evidence introduced at trial that showed such authority arose in police officers by custom or usage.

The federal question of whether petitioners rights to due process were violated are being raised explicitly for the first time here. The opinion of the Ohio Supreme Court in this case is the first time it has been explicitly stated that the "duty" petitioner allegedly attempted to influence was one of which a person would have no notice. First,

although the Ohio Supreme Court referred to a duty arising from custom or usage, there was no evidence of such custom or usage at the trial. Second, a duty arising from custom and usage, and not part of any regulation, ordinance or statute, is too remote for a person to have adequate notice upon which to base criminal liability. Such a finding is a return to the era of common law crimes. Finally, it was first explicitly brought up in the opinion of the Ohio Supreme Court that it was the judgment of a prosecutor that was influenced, where the indictments referred only to influencing police officers.

REASONS FOR GRANTING WRIT

Police officers often appear at pretrials (where plea bargaining takes place) in order to give prosecutors factual accounts of the incidents that

gave rise to the charge. The police officer's duty at the pretrial is just that: to give the factual account of what occurred. That is the scope and limit of a police officer's duty at a pretrial in Ohio.

Petitioner was convicted of attempted bribery for trying to influence two police officers in their duties at a pretrial. However, both officers testified that Petitioner did not try to influence their factual account of the arrest of Petitioner's client. No evidence of police duties arising from custom or usage was presented at trial.

In affirming Petitioner's conviction, the Supreme Court of Ohio impliedly, and without supporting evidence, found that police officers have a duty, either by delegation from the prosecutor or by custom or usage, to grant or deny plea bargains.

Police officers neither have, nor should they have, duties that are vested in prosecutors. Police officers, by the very nature of their work, do not have the training and judgment necessary to weigh the varying and often complex circumstances that enter a prosecutor's decision about a plea bargain. The duties regarding plea bargaining are vested specifically in attorneys.

To find Petitioner guilty of trying to influence a police officer in a duty the officer has neither directly, nor by custom or usage, nor by the apparent delegation of the prosecutor's non-delegable duty is a denial of Petitioner's right to due process of law. When an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past

conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." (Bouie v. Columbia, 378 U.S. 347 at 354, 12 L.Ed2d 894 at 900, 84 S.Ct. 1697 at _____ (1964)).

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

_____
Paul W. Cassidy
Counsel for Petitioner

_____
Ronald M. Mottl
Counsel of Record

CERTIFICATE OF SERVICE

I, Ronald M. Mottl, attorney of record for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August _____, 1985, I served three copies of the foregoing Petition for Writ of Certiorari on the State of Ohio, respondent herein, by mailing said copies in a duty addressed envelope with first class postage prepaid to John T. Corrigan, Esq., attorney of record for respondent at Courts Tower, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

_____
Ronald M. Mottl
Attorney of Record
6400 Pearl Road
Parma Heights, Ohio 44130
(216) 884-800

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

Thomas J. Italiano, Petitioner

vs.

State of Ohio, Respondent

ENTRY OF APPEARANCE OF
COUNSEL FOR PETITIONER

The Clerk will enter my appearance as Counsel of Record for the Petitioner.

_____
Ronald M. Mottl
6400 Pearl Road
Parma Heights, Ohio 44130
(216) 884-8000

The Clerk is requested to notify counsel of action of the Court by means of REGULAR MAIL.

In this case, the person to be notified for Petitioner is:

Ronald M. Mottl
6400 Pearl Road
Parma Heights, Ohio 44130
(216) 884-8000

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO, APPELLEE

vs.

ITALIANO, APPELLANT

Case No. 84-968

June 26th, 1985

1. For purposes of a prosecution for bribery of a public official, an official duty can arise from usage as well as from a written rule or regulation.

2. It is not a defense to a charge of bribery that the official bribed did not have the ultimate authority to do the act sought, provided that the money was paid in exchange for the official's efforts to influence the acts or judgment of others.

(No. 84-968-Decided June 26, 1985.)

APPEAL from the Court of Appeals for Cuyahoga County.

Defendant-appellant, Thomas J. Italiano, was indicted on one count of bribery, R.C. 2921.02, arising from the payment of $50 to Patrolman Robert Moczulski of the Cleveland Police Department. Subsequently, he was indicted on a second charge of bribery, resulting from the payment of $50 to Patrolman William Hyland, also of the Cleveland Police Department. Defendant entered pleas of not guilty to the charges and waived his right to trial by jury. The two charges were consolidated for trial to the court, which found defendant guilty of two counts of attempted bribery based upon the following evidence.

Defendant, an attorney, was retained to represent one Jerry Riffle

on charges of operating a motor vehicle while intoxicated ("OMVI") and "peeling tires" pending against Riffle in the Cleveland Municipal Court. According to the testimony of Moczulski, one of the arresting officers in the Riffle case, defendant approached him at a pretrial on the charges and inquired whether the officer would agree to a reduction of the OMVI charge to reckless operation. Moczulski expressed his objection to such a reduction. Whereupon, defendant stated his intent to continue the pretrial and meet with the officer to discuss the charges.

Jerry Riffle's wife testified at defendant's trial that defendant told her and her husband at the pretrial that the officer would not agree to a reduction, but that defendant thought that "$100 would take care of it." The

Riffles gave defendant the money and defendant gave them a receipt, which was admitted into evidence at defendant's trial.

Defendant's account of the first pretrial varies somewhat from that of Moczulski. Defendant testified that he and the prosecutor agreed to a reduction of the charge to "physical control," but that the prosecutor wanted to inform the officer of this agreement as a courtesy. Defendant perceived the officer to appear to object to the reduction, and the prosecutor returned to defendant and suggested a continuance to allow defendant to talk with the officer.

After the continuance of the first pretrial, defendant called Moczulski and arranged a personal meeting, telling the officer that "if you will meet me I think it will be worth your while." The two

met in the afternoon, and their conversation was recorded by the Professional Conduct and Internal Review Unit of the Cleveland Police Department. The recording of the conversation was played for the trial court, and the tape and a transcript were made exhibits in the case.

In the conversation with Moczulski, defendant spoke both of the financial and social consequences of an OMVI conviction, and of the possibility of business referrals from Moczulski. Defendant then gave the officer an envelope containing $50 and several of his business cards. When the officer inquired what defendant wanted for the $50, defendant requested "some leniency for the guy," and suggested that he would like to work out a reduction of the charge to reckless operation or "physical control." The two ultimately

agreed that the officer would agree to whatever reduction defendant could arrange with the prosecutor.

At the second pretrial, held on January 26, 1983, Moczulski's partner, Hyland, appeared in his stead. Hyland professed ignorance of the agreement defendant had reached with Moczulski and, following a conversation outside the courtroom, defendant gave Hyland $50 to go along with the prior agreement. Despite this payment to Hyland, he stated to defendant that he preferred to continue the case to give him an opportunity to confer with Moczulski, and no disposition was made of the case at the second pretrial.

Mrs. Riffle's testimony indicated that defendant had phoned the Riffles prior to this second hearing and asked them to bring another $100 to court.

When he received this money from the Riffles, defendant told them that the first officer had "double-crossed" the second officer, and implied that the money was for the second officer.

The trial court initially found defendant guilty of two counts of bribery, but, upon reconsideration, vacated that judgment, and found defendant guilty of two counts of the lesser-included offense of attempted bribery. Defendant's conviction was affirmed on appeal.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

John T. Corrigan, prosecuting attorney, and N. Stephen Nigolian, for appellee.

Cassidy & Mottl and Paul W. Cassidy, for appellant.

REILLY, J. Defendant-appellant's first two propositions of law raise but one issue: whether the state proved that defendant gave money to the officers with the purpose to influence them in the discharge of their duties. Defendant argues that the officers' sole duty at the pretrial is to relate the operative facts to the prosecutor, and that it is only the prosecutor who is empowered to negotiate a reduction of the charge. As a one-time city prosecutor and an experienced defense attorney, defendant notes, he was aware that the officers had no authority to reduce the charges against his client. Moreover, he asserts, the testimony shows that he did not at any time ask either officer to fail to appear at the pretrial or to change their version of the arrest of Riffle. Finally, defen-

dant contends the only evidence possibly supporting a finding of an intent to influence the officers in the discharge of their duties was circumstantial in nature, and was not irreconcilable with any reasonable theory of innocence. Thus, defendant concludes that the state failed to show that he paid the money with the intent necessary to constitute a bribe under R.C. 2921.02.

Defendant's argument in support of these first two propositions of law is premised upon an overly restrictive view of the role of the police officers at a pretrial. He asserts that their only role is that of witnesses, and cites the officers' testimony and a Cleveland Police Department manual outlining the officers' duties as proof of this assertion. For purposes of a prosecution for

bribery of a public official, however, an official duty can arise from usage as well as from a written rule or regulation. United States v. Birdsall (1914), 233 U.S. 223; Kable v. State (1973), 17 Md. App. 16, 299 A. 2d 493, certiorari denied (1973), 268 Md. 750.

It is clear from defendant's own testimony that the prosecutor assigned to the Riffle case deferred to the recommendation of the arresting officers in considering a reduction of the charge. Thus, according to defendant, although he and the prosecutor had tentatively agreed to a reduction to "physical control," it became necessary to continue the case and meet with Moczulski when the officer voiced his objection to the reduction. Therefore, the officer was charged with the duty to confer with the prosecutor beyond merely

relating the factual occurrence which led to the arrest, and it was this duty which defendant sought to influence through the payment of money.

Although this exact question has not been specifically considered by this court, other jurisdictions have held that it is not a defense to a charge of bribery that the official bribed did not have the ultimate authority to do the act sought, provided that the money was paid in exchange for the official's efforts to influence the judgment of others. See e.g. Birdsall, supra; Kable, supra; People v. Mitchell (1972), 40 App. Div. 2d 117, 338 N.Y. Supp. 2d 313. Such reasoning is persuasive in the present instance. It was the practice, at least with the prosecutor in the Riffle case, to obtain the arresting officer's opinion on any possible reduction of the

charge. Consequently, defendant sought to influence the officers in the discharge of this duty.

Moreover, there was sufficient direct evidence presented to the trial court to show that it was defendant's intent to influence the officers' actions. Defendant argues that the circumstantial evidence relied upon to prove intent is not irreconcilable with a reasonable theory of innocence, such as the payment of money for future business referrals. However, it is only when circumstantial evidence alone is relied upon to prove an essential element of the crime that it must be irreconcilable with any reasonable theory of innocence. State v. Kulig (1974), 37 Ohio St. 2d 157 (66 O.O.2d 351). Here, there was also direct evidence that defendant intended to

influence the discharge of the officer's duties, including his statement to the Riffles that Moczulski would not agree to a reduction, but that "$100 would take care of it" and defendant's statement to Moczulski that the $50 was in exchange for "some leniency for the guy."

Defendant also seems to argue that the circumstantial evidence does not support the inference that he intended to influence the officers since it indicates only that he would agree to a charge of "physical control," that the prosecutor had already agreed to a reduction to "physical control," and that Moczulski testified that he would not object to a reduction to "physical control." Thus, he maintains there was nothing to gain by bribing the officers. However, as noted above, there was direct evidence of defendant's intent to

influence the officers and, thus, there was sufficient support for the inference that defendant intended to seek a reduction to the least charge possible, reckless operation.

The evidence indicates that the arresting officers were, by custom or usage, vested with the official duty to confer with the prosecutor on the charges and render their unbiased opinion on any proposed reduction. It was this official duty which defendant sought to influence by the payment of money, and such payment constitutes the offense of bribery under R.C. 2921.02.

Defendant argues in his third proposition of law that he established the affirmative defense of entrapment at the trial level through proof that he was not predisposed to commit the crime of bribery, and that the criminal design

originated with the police, who induced him to commit the offense. He alleges that the fact the criminal design originated with the law enforcement officials is clearly shown in the evidence that it was the prosecutor who suggested that defendant meet with Moczulski, that defendant desired a meeting in a public building but that Moczulski preferred a private location, and that it was Moczulski who repeatedly steered the conversation to the Riffle case and who first asked defendant what a reduction was worth to defendant and his client. He further argues that he proved a lack of predisposition through character witnesses who testified to defendant's excellent reputation for truth and veracity, and through proof that he had no prior criminal record.

Entrapment was defined by this court in the first paragraph of the syllabus in State v. Doran (1983), 5 Ohio St. 3d 187, as follows:

"The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute."

It is not entrapment, however, when it is shown that the accused was predisposed to commit the offense, and the state merely provided the accused with the opportunity to commit the offense. Doran, supra, at 192.

In this case, defendant's predisposition to commit bribery is supported by sufficient evidence. He stated to the Riffles, at the first pretrial, that he

felt that $100 would "take care of" Moczulski's objection to a reductin of the charge. The meeting with Moczulski, at which defendant gave the officer $50, was arranged by the defendant for the express purpose of discussing the Riffle case. Thereafter, defendant met Hyland at the second pretrial, and gave him $50 without the ruse of future business referrals. While the character evidence offered by defendant was also probative of the issue of predisposition, the resolution of conflicting evidence was for the trial court, whose judgment is supported by sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230 (31 O.O.2d 457).

Moreover, the evidence cited by defendant fails to establish that the state planted the criminal design in the innocent mind of defendant. His

reference to the fact that it was the prosecutor who suggested that he meet with Moczulski is not probative of defendant's contention, since there is no proof that the prosecutor suggested a payment to the officer and, further, considering that there are countless legitimate reasons for a meeting between defense counsel and the arresting officer.

The fact that the officer preferred a private location for the meeting cannot be considered an inducement to commit a bribe. In fact, the testimony shows that defendant did not want to discuss the matter over the telephone, because he felt that police phones were tapped. Nonetheless, the best evidence of the origin of the criminal design is defendant's own testimony that he told the Riffles that, while he did not know

whether Moczulski would take any money, it was his impression that the officer wanted a bribe.

In summary, there was sufficient probative evidence to support the trial court's finding that defendant was predisposed to commit the offense of bribery, and that the criminal design was not planted in his mind by the state. The state merely provided defendant with the opportunity to offer the bribe, and did not induce him to commit the offense.

For the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

SWEENEY, Acting C.J., LOCHER, HOLMES, C. BROWN, DOUGLAS and WRIGHT, JJ. concur.

SWEENEY, J., sitting for CELEBREZZE, C.J.

REILLY, J., of the Tenth Appellate District, sitting for SWEENEY, J.

JOURNAL ENTRY AND OPINION

OF COURT OF APPEALS OF OHIO,

EIGHTH DISTRICT

COUNTY OF CUYAHOGA

in the case of

STATE OF OHIO, Plaintiff-Appellee

vs.

THOMAS J. ITALIANO, Defendant-Appellant

CASE NOS. 47363 and
47366

DATE OF DECISION: April 5, 1984

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common Pleas
Case Nos. CR-180,119 (#47363)
CR-179,842 (#47366)

JUDGMENT: AFFIRMED

CORRIGAN, J.:

Defendant-appellant, Thomas J. Italiano, was charged with two counts of bribery, in violation of R.C. 2921.02. Trial to the court was held on June 30, 1983, the evidence revealing that defendant phoned Patrolman Moczulski of the Cleveland Police Department regarding the arrest of his client for DWI. Defendant asked the officer if they could meet to discuss the case and would not discuss the matter over the phone because police lines are tapped. A meeting was arranged, but prior to the meeting, Patrolman Moczulski contacted the Cleveland Police Professional Conduct and Internal Review Unit (P.C.I.R.). P.C.I.R. placed the officer under surveillance and tape-recorded his meeting with defendant.

At the meeting between the officer and defendant, the defendant passed Patrolman Moczulski an envelope containing $50 and some business cards and talked to him about the possibility of cooperating in a reduction of the charge against his client. Officer Hyland, Patrolman Moczulski's partner, appeared at the next pretrial and defendant told him about the "prior arrangement" he made with his partner. Defendant also gave him $50.00.

The trial court found defendant guilty as charged and later sentenced him on two counts of attempted bribery on August 8, 1983. Appellant filed this timely appeal and assigns the following three errors upon review:

> I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON BOTH COUNTS BECAUSE THE CRIME OF BRIBERY WAS NOT SHOWN WHEN THE

OFFICERS INVOLVED LACKED AUTHORITY TO DO THAT FOR WHICH THE BRIBE IS SAID TO BE GIVEN AND WHEN THE APPELLANT KNEW THE OFFICERS LACKED SUCH AUTHORITY.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON BOTH COUNTS BECAUSE ONE CANNOT BRIBE AN OFFICER TO DO SOMETHING THE OFFICER HAS ALREADY AGREED TO DO.

III. THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY OF ATTEMPTING TO BRIBE OFFICER MOCZULSKI BECAUSE APPELLANT PROVED ENTRAPMENT BY A PREPONDERANCE OF THE EVIDENCE.

I.

Appellant argues in his first assignment that he should have been acquitted because the crime of bribery was not shown where the officers lacked the authority to do that for which the bribe was allegedly given.

Patrolman Moczulski testified that his duty as a police officer involved giving the prosecutor the factual basis

for an arrest. Appellant himself recognized this duty when he testified that in his former position as an assistant city prosecutor, when dealing with DWI, he talked to police officers who would present their facts, and then he would prepare orders charging people for whatever he felt the facts warranted (Tr. 250). Thus, the police officer's presentation of the facts was extremely influential in determining the charge a defendant faced.

In the instant case, although appellant did not request that the officer color the facts or change his testimony, Patrolman Moczulski testified that appellant asked him to "go along with anything other than the DWI charge" (Tr. 60-61). An examination of the transcript of the tape-recorded conversation of the meeting confirms this

statement, as the following cross-examination of Moczulski by appellant's counsel himself reveals:

> Would you look at that and follow me? This is Mr. Italiano talking.
>
> "Um, I'd appreciate it, you know, if you and your partner can, uh, help my client a little, uh, try to give him a break where, uh --"
>
> Your response is:
>
> "Well, exactly, exactly what are you looking for?"
>
> And Tom Italiano then said, "Uh, anything but, uh, --" excuse me. "Anything but, uh, DWI where the poor guy is going to have go out and find himself some real expensive insurance."
>
> You responded, "Uh-huh."
>
> Now, if you then will go about ten lines further to a sentence that begins "So I'm hoping." This is Italiano talking again.
>
> "I'm hoping that, you know, as long as you and your partner don't object, I would be able to talk the prosecutor into

changing it to either reckless or, uh, uh, what do they call it, DW, um, physicial control."

(Tr. 66)

The statute governing bribery, R.C. 2921.02, provides in pertinent part:

"(A) No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit."

Our review of the evidence reveals that appellant clearly tendered $50.00 to Patrolman Moczulski and $50.00 to Patrolman Hyland with the purpose to influence them with respect to the discharge of their duty. Therefore, the first assignment is overruled.

II.

Appellant argues in his second assignment that he should have been

acquitted of both counts because one cannot bribe an officer to do that which he already agreed to do; i.e. Moczulski had not objection to amending the charge to "physical control".

A quick review of the conversations sets forth above reveals that appellant wanted the officers to agree to whatever he and the prosecutor decided upon, whether it be "physical control" or "reckless operation" (TR. 36, 60-61, 66-67). Furthermore, while the officer stated that he was "willing" to reduce the DWI charge to "physical control", there is no evidence to indicate that he and the prosecutor had already reached an agreement to charge appellant's client with "physical control".

Therefore, we disagree with appellant's contention that he was attempting to bribe an officer to do that

which the officer already agreed to do. In talking to the second officer, Patrolman Hyland, to whom he gave $50.00, appellant spoke of a "prior arrangement" with his partner and not about any agreement reached with the prosecutor. (Tr. 103, 130). Accordingly, the second assignment is not well taken.

III.

Appellant charges in the third assignment that he proved by a preponderance of the evidence that Moczulski entrapped him. We strongly disagree. From a careful review of the record the appellant's predisposition to commit or attempt to commit the offense of bribery is evident. In State v. Doran (1983), 5 Ohio St.3d 187, the Supreme Court has adopted the subjective test of entrapment focusing upon the predisposition of

the accused to commit an offense. The Court pointed out that a person is not entrapped when the police, for the purpose of detecting crime, merely present the accused with an opportunity to commit an offense. Doran, supra, at 406.

Appellant points out in his appellate brief numerous examples to indicate that Patrolman Moczulski appeared secretive about his meeting with appellant, and therefore appellant contends that the idea of the offense originated with the officer. Appellant, however, overlooks other evidence which indicates that he himself was predisposed to bribery. For example, Moczulski testified that, after the first pretrial, appellant asked him to step out in the hallway so they could speak (Tr. 14); appellant asked him if he

would accept "reckless operation" (Tr. 15); appellant called him on January 4, 1983 to set up a meeting, did not want to talk on police lines, and did not want to meet at the station (Tr. 18, 20, 21); appellant requested a different location because employees were exiting the building and he did not want to be seen (Tr. 29); and appellant pulled out the envelope containing the cash almost immediately upon entering the car (Tr. 31). The testimony of Diane Riffle, the wife of appellant's client, Jerry Riffle, covered conversations between the appellant and the Riffles as to why he needed additional money beyond his fee. Appellant indicated at the December 15, 1982 appearance at court that he thought $100 would take care of the police officers (Tr. 145). At the January 26, 1983 court appearance Mrs.

Riffle related that the appellant said "one police officer had supposedly double-crossed the other and didn't know nothing of the deal the other police officer had made beforehand", so another $100.00 was required (Tr. 147). The trial court, as the trier of fact, could easily have disbelieved that the actions and conversations were those of an attorney merely seeking to discuss a case with the arresting officers. Since the credibility of the witnesses was solely for the trier of fact to judge, we conclude, after a close examination of the record, that sufficient evidence was presented to the trial judge hearing the case to sustain the conviction. State v. DeHass (1967), 10 Ohio St. 230.

Since appellant failed to establish entrapment, the third assignment is also overruled.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for his appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, C.J.

MARKUS, J., CONCUR

JOHN V. CORRIGAN, JUDGE

IN THE COURT OF
COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, Plaintiff

vs.

THOMAS J. ITALIANO, Defendant

CASE NOS. 179832
and 180119

JOURNAL ENTRY

August 23, 1985

This day again comes the Prosecuting Attorney on behalf of the State of Ohio and defendant Thomas J. Italiano in open court represented by counsel for sentencing in CR 179832 and CR 180119.

The court, after careful re-assessment of the evidence and the law vacates its findings of July 6, 1983 and finds the defendant guilty of two counts of Attempted Bribery, RC 2923.02 and RC

2921.02, a lesser but included offense under the indictments.

The defendant is sentenced to one (1) to five (5) years in the Columbus Correctional Facility, Columbus, Ohio on each count, and that he pay the cost of this prosecution for which execution is awarded.

Sentence is suspended and defendant placed on two (2) years probation and to pay court costs. Defendant fined two hundred and fifty dollars ($250.00) on each count and defendant ordered to perform five (5) hours pro bono service per week.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
SEP 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-315

In the Supreme Court of the United States

October Term, 1985

THOMAS J. ITALIANO,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

1. The Fourteenth Amendment of the Constitution of the United States, specifically the due process of law clause, is not violated where the duties of police witnesses are defined to include the unbiased presentation to the prosecuting attorney of the facts leading to an arrest.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions presented herein were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Su-

preme Court of Ohio. The trial court, sitting as the finder of fact, found the petitioner guilty of two counts of attempted bribery. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio granted jurisdiction, and subsequently affirmed the judgment of the Eighth District Court of Appeals.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court. There is, therefore, no substantial federal question presented by the petition for certiorari.

STATEMENT OF THE CASE

Petitioner, Thomas J. Italiano, was indicted in two cases, CR 179832 and CR 180199, of the offenses of bribery in violation of Ohio Revised Code, Section 2921.02.

Petitioner waived his right to a trial by jury and was tried by the Court on June 30, 1983. The trial court rendered a verdict of guilty on each of the two counts of bribery on July 6, 1983. Prior to sentencing, the trial judge vacated his guilty finding and found defendant guilty of two counts of attempted bribery. Petitioner was sentenced on August 3, 1983. The Petitioner's actions were consolidated before the Eighth District Court of Appeals. The verdict of the trial court was affirmed by the Eighth District Court of Appeals on April 5, 1984.

The Supreme Court of Ohio granted jurisdiction to the petitioner. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals on June 26, 1985, at 18 Ohio St. 3d 38, and reprinted in Appendix A.

STATEMENT OF THE FACTS

Cleveland Police Patrolmen Robert Moczulski and William Hyland were assigned to a marked police vehicle on August 29, 1982. The officers were on routine patrol in the Cleveland Police Sixth District when they observed an automobile driven by Jerry Riffel. The actions of the driver led these officers to place Jerry Riffel under arrest for driving while intoxicated and for peeling tires. Charges were subsequently filed by the Cleveland Municipal Prosecutor's Office (R. 10).

Subpoenas were issued by the Cleveland Municipal Court for appearance in Court of both patrolmen for the date of December 15, 1982 (State's Exhibit 7 and R. 10). Officer Moczulski appeared as subpoenaed and Officer Hyland was engaged in another court appearance (R. 10, 11).

Patrolman Moczulski was approached while in the courtroom by the attorney for Jerry Riffel, petitioner Thomas Italiano. After being asked to step out of the courtroom, Officer Moczulski was asked if he "would accept a plea from his through [sic]—from his client through him to the charge of reckless operation." (R. 15).

Officer Moczulski replied: "I told him absolutely no." (R. 15).

The officer continued:

> "I don't know how they operate in Parma . . . the best they could expect from me (Patrolman Moczulski) here and the Court itself through the prosecutor would be a reduction from State DWI to City Physical Control." (R. 15).

When pressed by petitioner, Officer Moczulski responded that reckless operation "absolutely" did not apply (R. 16). Petitioner then sought and obtained a continuance of the matter. Petitioner asked the patrolman if he could contact the officer at a later date (R. 16, 17).

Petitioner telephoned Officer Moczulski on January 4, 1983. Petitioner requested a meeting in person because "the police phones are taped" (R. 20).

Petitioner did not want to meet with Officer Moczulski at the Police Department, Second District (R. 20, 21). Petitioner concluded this telephone call by stating, "If you will meet me I think it will be worth your while" (R. 22).

Petitioner asked Patrolman Moczulski to meet with him in his office at the Parma City Hall on Friday, January 8, 1982 at 4:00 p.m. (R. 21). After informing his partner, Officer Hyland, Patrolman Moczulski completed his assigned shift, went to his home and contacted Lieutenant Gurtsak of the Cleveland Police Intelligence Unit. Lieutenant Gurtsak advised Officer Moczulski to contact the Cleveland Police Professional Conduct and Internal Review (PCIR) Unit that next morning (R. 25, 26). After reporting the above facts and under the direction of PCIR Sergeant Mark Romph, Patrolman Moczulski placed a controlled, recorded telephone call to petitioner (R. 26, 27). A meeting was arranged at 4:20 p.m. in an open area which facilitated surveillance and photographing were such steps necessary (R. 28-30) (State's Exhibit 1A, Joint Exhibit A).

The January 7, 1982 meeting took place between petitioner and Officer Moczulski in the latter's vehicle (R. 29).

State's Exhibit 2B and Joint Exhibit B set forth the contents of the resulting conversation and contain the physical passing of a bank envelope, containing fifty dollars, and business cards. These items were accepted into evidence as State's Exhibit 3.

Petitioner asked Officer Moczulski to give his client a break (State's Exhibit B and Joint Exhibit B, page 5). Petitioner further stated his client would "show his gratitude. . ." (Joint Exhibit B, page 7). The conversation continued to cover the gambit of possibilities which were intended to gain a reduction in Riffel's charges (Joint Exhibit B, pages 10-12).

Further evidence at trial includes the testimony of Patrolman William Hyland.

Officer Hyland testified that he was subpoenaed to appear at scheduled pre-trial conferences on December 15, 1982 and January 26, 1983. The patrolman also stated that he spoke with his partner, Officer Moczulski concerning the January 4, 1983 telephone call from petitioner (R. 98).

Officer Hyland related that petitioner stated that there was a "prior arrangement" made with Officer Moczulski (R. 103); he would give Patrolman Hyland fifty dollars ($50.00) (R. 104); he wanted the officers to get together so they would know the deal that had transpired (R. 120); and, that he had given Officer Moczulski fifty dollars ($50.00) (R. 122).

Officer Hyland testified on direct examination that petitioner accompanied him to the Clerk's Office, received change for a one hundred dollar bill ($100.00) and together they returned to the courtroom (R. 122-124, 128-130). Petitioner handed Officer Hyland fifty dollars

($50.00) (State's Exhibit 4) while near the phone booths on the thirteenth floor. The case was then continued as petitioner preferred to proceed when Patrolman Moczulski was present, due to the "arrangements" (R. 134).

Sergeant Mark Romph testified that he was the PCIR Unit investigator assigned to this case. He stated that he interviewed Patrolmen Moczulski and Hyland. Sergeant Romph further identified the *Manual of Rules and Regulations and Procedures of the Cleveland Police Department,* Section 3.18, Prohibited Conduct (State's Exhibit 11), which states:

> "Personnel of the division of police shall not accept or solicit any present of money or other valuable thing from any person under their jurisdiction, or control of with whom they had had or are likely to have official relations." (R. 156, 157).

Sergeant Romph monitored the phone call of January 5, 1983, observed the meeting of January 7, 1983, was the officer in control of photographing of, and listened to the transmission of that meeting while in a surveillance capacity (R. 159, 161). Sergeant Romph further maintained custody and control of the tapes and photos in evidence (State's Exhibits 1-4 and 7-13).

Mrs. Diana Lee Riffel testified that she and her husband, Jerry Riffel retained petitioner to represent Mr. Riffel in the subject DWI proceedings. She testified that she paid petitioner's requested retainer of three hundred and fifty dollars ($350.00) in two installments, one of two hundred dollars ($200.00) and one hundred and fifty dollars ($150.00). Further evidence shows that on September 30, 1982, petitioner gave the Riffels a receipt for the fee marked

"Received of Jerry Riffel, $150, legal fee, balance in full for DWI.

ss/-T.J. Italiano."
(State's Exhibit 9)
(R. 149).

Mrs. Riffel testified that at the December 15, 1982 pre-trial conference, petitioner stated:

". . . he needed a hundred dollars, that the police needed a hundred. . . He said the police officers told him they were too underpaid to play Mr. Nice Guy and give anybody a break, and he thought $100.00 would take care of it." (R. 145).

Mrs. Riffel then gave petitioner the requested one hundred dollars ($100.00). She continues that during a telephone conversation in January, 1983, he further requested another one hundred dollars ($100.00) at the future January 26, pre-trial (R. 145).

Mr. Riffel gave petitioner an additional one hundred dollar bill ($100.00) on January 26, 1983 at the pre-trial conference (R. 146). Petitioner told the Riffels that:

". . . the one police officer has supposedly double-crossed the other one and didn't know nothing of the deal the other police officer had made beforehand. So we (the Riffels) assumed he was going to give it to that police officer." (R. 147).

Mrs. Riffel presented one of the defendant's business cards upon which he had noted the first one hundred dollar payment and upon which she had noted the second (R. 150) (State's Exhibit 10).

REASONS FOR DENYING THE WRIT

The actions of petitioner clearly violated Ohio Revised Code, Section 2921.02 which states *inter alia*:

> "2921.02 Bribery.
>
> (A) No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit."

The arguments of petitioner attempt to create, then subsequently demolish a "straw man" of police authority. Contra to petitioner's contentions, Federal and State law is replete with examples and definitions of both bribery and "duty" as used in the statute.

Established legal definitions of the scope of the purpose of bribery hold that it is as broad as the duties of the officer who accepts the bribe. 12 AM. JUR. 2d, *Bribery*, Section 8.

This scope of purpose must be considered to encompass all relevant actions of a municipal law enforcement officer. The duties of such officers are seen to flow from the basic enforcement of the law and protection of citizens through the requisite judicial proceedings. Therefore, the interaction of the police officer and the prosecuting attorney is not separated by any line of demarcation. Indeed, no prosecution can proceed without honest, intelligent cooperation and testimony by police officials with the prosecuting attorney. Further discussion on this point seems needless as the Ohio Revised Code, in Section 290.01

(K)(1) and (8) defines both municipal police officers and assistant prosecuting attorneys as "law enforcement officers."

The duty at issue here includes the duty to arrest one who violates an ordinance or law within the law enforcement officer's jurisdiction. It further must be construed to encompass assistance by the officer in all proceedings based upon his arrest. The prosecuting attorney in the instant case must rely upon the professional assessment of the officers for the attorney's understanding of the underlying facts of the alleged violations. The officers in the instant case comprise the complete eyewitness testimony available to the municipal prosecutor.

The Ohio Supreme Court, realizing these natural and logical aspects of a police officer's duty, states:

> "For purposes of a prosecution for bribery of a public official . . . an official duty can arise from useage as well as from a written rule or regulation. *United States v. Birdsoll,* (1914) 233 U.S. 223; *Kable v. State,* (1973), 17 Md. App. 16, 299 A. 2d 493, certiorari denied (1973), 268 Md. 750." *State v. Italiano,* 18 Ohio St. 3d 38, at 41.

Ohio courts have held that where dealt with in bribery cases, "duty" has been defined to be that which exists by reason of natural implication from the power specifically granted by statute or by reason of the lawful custom or regulation of a department of government. *State v. Carney,* 14 Ohio Op. 298, 28 Ohio L. Abs. 555 (Franklin County, 1939); *State v. Frabutt*, 18 Ohio Op. 2d 277 (Lake County, 1961).

Herein, it is a logical and "natural" implication that an arresting officer will relate facts and opinions to the

prosecuting attorney without coloring those matters in a manner desired by petitioner.

The trial court found the facts and evidence sufficient by which to find petitioner guilty of attempting to bribe two Cleveland Police Officers.

In *Curtis v. State,* 113 Ohio St. 187, 148 N.E. 834 (1925), this Court held that the fact that the person bribed fails to carry out his part of the compact, or has no opportunity to do so, is not material.

The Court in *Carney, supra,* holds that an officer's lack of jurisdiction is also immaterial.

It further appears that the criminal nature of an act as bribery is not lessened by the fact that the person to whom the bribe is offered is only a *de facto,* and not a *de jure,* officer, as long as that person is one or the other. 12 AM. JUR. 2d, *Bribery,* Section 14.

The case at bar clearly exhibits a fact situation in which petitioner intended his act of bribery to cause the officers to color their presentation of the facts in such a manner as to cause the unwitting assistant municipal prosecutor to reduce the charged offense to one which Riffel would not get "hurt" by suspensions or insurance companies (Joint Exhibit B, page 11).

This attempt at subtle bribery should not be allowed to prevail. The statute and case law join to place the intent to commit the crime upon the petitioner. The burden of proof, having been met before the trial court, exhibits by direct and circumstantial evidence that in spite of petitioner's legal training he perceived the scope of the officers' duties to include the recitation of facts to the prosecutor. Petitioner's act of bribery entails this

basic "duty", and is set forth in the record of proceeding by Joint Exhibit B and specifically, page 12.

The argument that the police officers could not, themselves, dismiss or reduce the charge before the court does not act to the benefit of petitioner. *Frabutt, supra,* holds that "it is not defense that a police officer does not have the power to quash a case as he was requested to do in exchange for money." Herein, the trial court clearly held that petitioner knew or had reason to believe that the opinions of the arresting officers would be seriously and conclusively considered by the assistant municipal prosecutor.

Petitioner argues through his brief that he did not attempt to influence the police officers *as witnesses.* This argument presupposes that the arresting officers are to stand mute when not seated upon the witness stand. Herein, petitioner insists that the officers, as both the charging parties and witnesses do not further participate in the preparation of their cases for trial or other resolution. This logic is quite damaging to the realities of criminal practice. Perhaps unsolicited opinions of witnesses may present some obscure reasons for this conclusion. However, where the government's attorney requests that assistance of witnesses, in the instant case, officers of the political subdivision, that assistance must be honestly, justly and lawfully extended. A ruling in support of the contentions set forth by petitioner will act to cause the necessity of uninformed prosecutions. Such ruling will further alienate the various representatives of the political subdivisions each from the others. Where no party has insisted that the arresting officers should control the decision making process, the expertise, assistance and indeed, eyewitness testimony of the officers must be

presented to the government's attorney in a professional unbiased manner.

The instant case clearly contains sufficient facts and evidence to overcome the argument of petitioner as a matter of law. Case law and statutes exhibit an understanding and contemplation of petitioner's contentions, and clearly fails to support those arguments.

Questions presented by petitioner, herein, construe the opinion of the Ohio Supreme Court to allow the delegation of prosecutorial functions to an arresting police officer. The instant fact situation when read with the Ohio Supreme Court's opinion does not support these contentions. Indeed Ohio's justices directly address this aspect of petitioner's argument. The Court terms petitioner's premise "an overly restrictive view of the police officer's [role] at a pre-trial." *Italiano* at 40.

Further, evidence presented at trial exhibits that the municipal prosecutor merely "deferred to the recommendation of the arresting officers in considering a reduction of the charge." *Italiano* at 40.

The Ohio Supreme Court holds:

> "Therefore, the officer was charged with the duty to confer with the prosecutor beyond merely relating the factual occurrence which led to the arrest, and it was this duty which defendant sought to influence through the payment of money." *Id.* at 40-41.

CONCLUSION

Petitioner's arguments do not present questions of law or fact which establish jurisdiction for granting of his petition for writ of certiorari.

No question exists whereby this Honorable Court can conclude that the right to due process of law was denied to the petitioner.

Therefore, we respectfully urge that this petition for writ of certiorari be denied.

Respectfully submitted,

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